

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 9)
of the Communications Act)
)
Assessment and Collection)
of Regulatory Fees for the)
1994 Fiscal Year)

MD Docket No. 94-19

COMMENTS OF CELLULAR COMMUNICATIONS OF PUERTO RICO, INC.

Cellular Communications of Puerto Rico, Inc. ("CCPR") hereby submits these comments in response to the Notice of Proposed Rulemaking in the above-captioned docket (released March 11, 1994) ("NPRM"). CCPR is a Delaware Corporation which, through wholly and majority-owned entities, operates the nonwireline cellular systems in 11 of the 12 Metropolitan Statistical Areas ("MSAs") and Rural Service Areas ("RSAs") in the Commonwealth of Puerto Rico. Accordingly, the Commission's proposed regulatory fee scheme will apply to CCPR.

CCPR competes in each of its cellular service areas with the Puerto Rico Telephone Company ("PRTC"). PRTC, directly or through an affiliate, is the local exchange carrier throughout Puerto Rico and PRTC is the wireline licensee in all 12 of the Commonwealth's cellular markets. PRTC is a division of the

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government of the Commonwealth of Puerto Rico. The Commonwealth has been a territory of the United States since 1898 and a Commonwealth since 1952. Its system of government is modeled after the state governments of the United States.

Section 9 (a) of the Communications Act of 1934, as amended,¹ authorizes the Commission to assess and collect annual regulatory fees. Section 9 (h) of the Act provides that the regulatory fees established under Section 9 "shall not be applicable to (1) governmental entities or nonprofit entities; or (2) to amateur radio operator licenses . . ."² In the NPRM, the Commission proposed the following definition of "governmental entity:"

any state, possession, city, county, town, village, municipal corporation or similar political organization or subpart thereof controlled by publicly elected or duly appointed public officials exercising sovereign direction and control over their respective communities or programs.³

This definition appears to exempt PRTC from regulatory fees. Such an exemption, however, would be contrary to both (1) the Commission's policy of licensing two competitors in each cellular market on the same terms and (2) the intent of Congress in legislating the governmental exemption.

¹ 47 U.S.C. § 159 (a), added by section 6003 (a) of the Omnibus Budget Reconciliation Act of 1993 ("the 1993 Budget Act"), Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 397.

² 47 U.S.C. § 159 (h).

³ NPRM at 7.

1. Exempting One Cellular Operator from Regulatory Fees Would Inhibit Competition.

The Commonwealth of Puerto Rico is the only jurisdiction under the United States flag where one of the cellular service providers is a division of a government. If the proposed definition is adopted, PRTC would be exempted from the payment of regulatory fees while CCPR would not. The Commission's decision to license a duopoly of nonwireline and wireline cellular carriers in each market was designed to maximize spectrum efficiency while fostering vigorous and *equal* competition between the two carriers.⁴ The Commission has consistently adopted rules and policies that have leveled the playing field between wireline and nonwireline operators in the cellular service.⁵ Exempting one cellular carrier from regulatory fees that are applied to its competitor would fly squarely in the face of these decisions and established policy.

⁴ See Cellular Communications Systems, 86 F.C.C. 2d 469, 503-04 (1981), recon., 89 F.C.C. 2d 58, further recon., 90 F.C.C. 2d 571 (1982).

⁵ See Cellular Communications Systems, 86 F.C.C. 2d at 496, aff'd on recon., 89 F.C.C. 2d at 80-82 (local exchange carriers must provide nonwireline cellular carriers with interconnection to the local switched telephone network on terms no less favorable than those provided to the wireline carrier), and The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carriers, 2 F.C.C. Rcd. 2910, 2914 (1987) (nonwireline carriers must be able to obtain the type of interconnection they request under reasonable terms and conditions).

2. Congress Did Not Intend to Exempt Commercial Communications Providers.

In adopting Section 9 of the 1993 Budget Act, the House Conference Committee incorporated the appropriate provisions of the House Report for a similar bill that had passed the House in 1991.⁶ In its discussion of "user fees," the Committee on Energy and Commerce noted exemptions for non-profit entities, amateur radio operators, public safety, noncommercial users, and governmental entities,⁷ later clarifying "noncommercial users" as public television and radio licensees and stating that all of these licensees were exempted in the public interest.⁸ This list indicates that the intent of Congress was to exempt only entities that do not offer services on a commercial basis. In contrast, PRTC operates its telephone and cellular facilities like any other commercial telephone or cellular carrier in the United States.

Congressional intent is further demonstrated in the House Report's section, "Explanation of FCC User Fees."⁹ This section does not contain discussions of

⁶ H.R. 1674. H.R. Rept. 102-207 was incorporated. House Conference Report No. 103-213 at 499 (1993).

⁷ House Report 102-207 at 11 (September 17, 1991).

⁸ Id. at 16.

⁹ Id. at 17-28.

public radio, public TV, amateur radio, or other services that qualify for the exemption, yet in its discussion of cellular radio, the report lists 1,468 cellular payees, clearly signifying that Congress expected *both* cellular carriers in *each* of the 734 MSAs and RSAs to be subject to regulatory fees.¹⁰

The Commission apparently had the same understanding that all providers of commercial communications services would be required to pay regulatory fees. In Table 4 of Appendix C to the NPRM the Commission lists Puerto Rico Telephone Corp. (sic) among the Top 20 local exchange carriers by access lines and estimates that it would be required to pay over \$57,000 in annual regulatory fees as an exchange carrier under the proposed rules.¹¹

When a governmental entity is involved in commercial activities that are traditionally outside the realm of government it should be regulated like any other commercial entity, not like the government.¹² The Commission has previously noted this important distinction. In the rulemaking proceedings regarding the

¹⁰ Id. at 25.

¹¹ NPRM at 48.

¹² See, e.g., Owen v. City of Independence, MO, 445 U.S. 643, 644 (1980) (discussing the absence of sovereign immunity at common law when a government performs the same proprietary functions as any private corporation); and City of Lafayette, LA v. Louisiana Power & Light Co., 435 U.S. 389, 413 (1978) (holding that a city which operated a commercial electric utility could only be exempt from anti-trust regulation for acts of government directed by the State as sovereign).

redevelopment of the 2 GHz spectrum, when the Commission initially formulated its exemptions from relocation procedures, it did not apply its rules to all governmental entities. Instead, it attempted to circumscribe public safety facilities, "provided that the majority of communications carried on those facilities are used for police, fire, or emergency medical services operations involving safety of life and property."¹³ The Commission should apply similar specificity to the definition of "governmental entity" when used in the context of exemptions from regulatory fees.

3. Recommended Definition of "Government Entity"

In recognition of the important public interests involved in the encouragement of vigorous competition on a level playing field between the two cellular carriers in Puerto Rico, the ideal situation would be to exempt not only

¹³ Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, 8 F.C.C. Rcd. 6589, 6617 (1993), modified by Memorandum Opinion and Order in ET Docket No. 92-9 (Rel. March 31, 1994) (confirming that facilities to be afforded special treatment should be narrowly defined, but subjecting all incumbent facilities to mandatory relocation).

PRTC but also CCPR from regulatory fees. Congress provided the Commission with the authority to level the field in this manner through Section 9 (d).¹⁴

The Commission has stated, however, that it will interpret this authority narrowly and will permit waivers only on a case-by-case basis in extraordinary and compelling circumstances upon a showing that a waiver or deferment would override the public interest in reimbursing the Commission for its regulatory costs.¹⁵ Accordingly, as an alternative to exempting both duopoly competitors from regulatory fees, the public interest would be served by the following definition:

With respect to Section 9 (h) of the Communications Act, 47 U.S.C. § 159 (h), a governmental entity shall be any state, possession, city, county, town, village, municipal corporation or similar political organization or subpart thereof controlled by publicly elected or duly appointed public officials exercising sovereign direction and control over their respective communities or programs *insofar as it is using communications facilities solely for noncommercial purposes. No government regulatee shall qualify for an exemption from regulatory fees for any service offered on a commercial basis.*

The adoption of this definition would preserve the Commission's goals of fostering equal competition in the cellular service and implement the intent of

¹⁴ "The Commission may waive, reduce, or defer payment of a fee in any specific instance for good cause shown, where such action would promote the public interest." 47 U.S.C. § 159 (d).

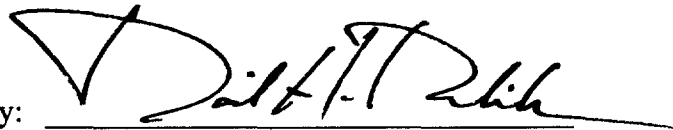
¹⁵ NPRM at 13-14.

Congress by providing significant funding for the Commission's operations from commercial communications carriers.

Respectfully submitted,

CELLULAR COMMUNICATIONS OF PUERTO RICO, INC.

By:

A handwritten signature in black ink, appearing to read "D. H. Pawlik", written over a horizontal line.

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